

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALLEN BROWN, JR.,

Defendant.

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CASE NO. 1:11-CR-496

OPINION & ORDER
[Resolving Doc. [30](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On February 16, 2016, Allen Brown requested the appointment of counsel to assist with filing a habeas motion under Title 28 United States Code Section 2255 in light of the Supreme Court’s June 2015 decision in *Johnson v. United States*.¹ This Court has reviewed the merits of Brown’s potential *Johnson* claim and **DENIES** the motion for appointment of counsel.

I. Discussion

The appointment of counsel in a civil proceeding is not a constitutional right and is justified only by exceptional circumstances.² Section 2255 habeas petitions are civil actions.

Brown would only have a potentially viable *Johnson* claim if his base offense level was increased because of a prior conviction that was a residual clause crime of violence. *Johnson* does not change the career offender decisions involving felony drug convictions and categorical violent crimes.

In calculating Allen Brown’s base offense level, the pre-sentence report listed two “felony convictions of either a crime of violence or a controlled substance offense [specifically,

¹ [Johnson v. United States, 135 S. Ct. 2551 \(2015\)](#) (holding that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution’s guarantee of due process).

² [Lavado v. Keohane, 992 F.2d 601, 606 \(6th Cir. 1993\)](#).

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Attempted Robbery under Cuyahoga County Common Pleas Case No. CR-02-425303 and Trafficking Offenses under Cuyahoga County Common Pleas Case No. CR-08-508693].”³

The controlled substance offense, Trafficking, is not affected by the *Johnson* decision because it was not classified as a crime of violence.

Moreover, a closer examination of Brown’s PSR reveals that he was sentenced for a number of other felony controlled substance offenses, namely, Drug Possession (F4) in Cuyahoga County Common Pleas Case No. CR-05-461617; Drug Possession (F4) in Cuyahoga County Common Pleas Case No. CR-06-0481199-A; and Drug Possession (F4) in Cuyahoga County Common Pleas Case No. CR-06-485033.⁴

Thus, Brown’s career offender guidelines calculation would not be affected post-*Johnson* because the pre-sentence report still lists at least two felony convictions for a controlled substance offense. Even if the attempted robbery offense were not to count as a crime of violence given this Court’s decision in *United States v. Patterson*⁵, Brown’s guidelines calculation would remain the same due to his other felony controlled substance convictions.

Brown has not shown that he has a meritorious *Johnson* claim. He cannot demonstrate that his civil §2255 proceeding is an exceptional circumstance warranting appointment of counsel.

³ Presentence Investigation Report at ¶20.

⁴ *Id.* at ¶¶54,58,61.

⁵ [*United States v. Patterson*, No. 5:14-CR-289, 2015 WL 5675110, at *2 \(N.D. Ohio Sept. 25, 2015\)](#)(finding that Ohio robbery is not a crime of violence post-*Johnson*).

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II. Conclusion

For the reasons above, this Court **DENIES** Defendant's motion seeking the appointment of counsel.

IT IS SO ORDERED.

Dated: April 11, 2016

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE